

Supreme Court, U. S.  
**FILED**

**SEP 22 1976**

**MICHAEL RODAK, JR., CLERK**

No. 76-27

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1976**

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**JOSEPH NAPLES, JR., PETITIONER**

**v.**

**UNITED STATES OF AMERICA**

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**ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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**ROBERT H. BORK,**  
*Solicitor General,*  
*Department of Justice,*  
*Washington, D.C. 20530.*

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Petitioner contends that there is a conflict among the circuits concerning the evidentiary standards properly used in determining whether an individual has violated the conditions of his probation and that this Court should grant the petition in order to resolve that conflict.

On February 28, 1975, petitioner pleaded guilty in the United States District Court for the Northern District of Ohio to having conducted an illegal gambling business, in violation of 18 U.S.C. 1955 and 2. He was sentenced to five years' imprisonment and fined \$20,000; execution of the sentence, except for \$10,000 of the fine, was suspended in favor of five years' probation. Two months later, petitioner's probation officer petitioned the district court to revoke petitioner's probation on the ground that he had committed perjury before a federal grand jury, in violation of 18 U.S.C. 1623. After having held three evi-

dentiary hearings, the district court revoked petitioner's probation (Pet. App. 1a-6a). The court of appeals affirmed (Pet. App. 7a-8a).

Petitioner does not contend that the district court used an improper evidentiary standard in determining whether he had violated conditions of his probation; rather, he contends that there is a conflict among the circuits concerning the standard properly used in such circumstances and that this Court should grant the petition in order to resolve that conflict. However, petitioner cites no conflicting appellate decisions on the subject, and we know of none.

The district court revoked petitioner's probation after having found that the "manifest weight of the evidence" showed that he had violated certain of the conditions of his probation (Pet. App. 2a; citing *United States v. Francischine*, 512 F. 2d 827 (C.A. 5) ). While some district courts have chosen to articulate this standard somewhat differently, speaking in terms of a "preponderance of the evidence" (e.g., *United States v. Strada*, 393 F. Supp. 19, 21 (W.D. Mo.) ), there is no reason to believe that such slight variation in the formulation of the standard is of any significance. Moreover, petitioner cannot reasonably suggest that his probation might not have been revoked had the government been required to satisfy a "preponderance of the evidence" rather than a "manifest weight of the evidence" standard.<sup>1</sup>

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<sup>1</sup>In affirming the district court's decision, the court of appeals concluded that "the finding that a term of probation was violated is amply supported by the evidence, and that the district court did not abuse its discretion in revoking probation" (Pet. App. 8a). We know of no case holding that the court of appeals should have employed some other standard on review, and petitioner does not refer to any.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,  
*Solicitor General.*

SEPTEMBER 1976.